

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Dublin Division

In the matter of:)	
)	Adversary Proceeding
JOSEPH B. ANDERSON)	
(Chapter 7 Case <u>386-00060</u>))	Number <u>386-0004</u>
)	
Debtor)	
)	
)	
JUDY FRANCIS ANDERSON)	
)	
Plaintiff)	
)	
)	
v.)	
)	
JOSEPH B. ANDERSON)	
)	
Defendant)	

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U.S. Bankruptcy Court
Southern District of Georgia POB

MEMORANDUM AND ORDER

The above adversary proceeding came on for trial on August 21, 1986, wherein the Plaintiff seeks a determination that a certain indebtedness owed by the Defendant arising out of a divorce decree is nondischargeable pursuant to 11 U.S.C. Section 523(a)(5). After hearing the evidence the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

(1) Plaintiff and Defendant were married for a period of 16½ years and were divorced by final judgment and decree in the Superior Court of Toombs County, Georgia, dated March 26, 1981.

(2) That final judgment and decree incorporated within its terms an agreement and stipulation which the parties had entered into. This stipulation and agreement was drafted by the wife's attorney and signed by the husband. The agreement provides, in relevant part, for the following payments:

- (a) Husband is to pay \$38.00 per month as child support.
- (b) Husband was to keep group hospitalization coverage on the minor child and pay any uninsured portion of medical bills.
- (c) Husband was to "satisfy the outstanding debts of the marriage".

Finally, Paragraph "9" provided: "The parties home shall be deeded over to the Plaintiff and the Defendant shall be responsible for paying for same at the rate of \$212.00 per month.

(3) The Plaintiff in this case testified that

at the time of the divorce she was earning approximately \$100.00 per week and that her husband was earning approximately \$200.00 per week. She further testified that she owned a one-half undivided interest in the home and that she had no special claim on the property arising out of inheritance, gift or otherwise.

(4) When asked why the child support figure was so low she replied that her husband had said "that he'd pay for the house, would give her a total of \$250.00 per month and would pay the difference in child support". She also testified on cross-examination that the difference of \$212.00 per month was additional child support.

(5) The agreement reached between the parties made no specific provision for payment of any lump sum or periodic alimony denominated as such but provided that "the parties hereto waive all statutory rights to present or future alimony".

(6) The Defendant has never deducted his payments of \$212.00 per month for Federal tax purposes claiming them to be alimony but has deducted the interest portion of the house payments he has made. Neither has the wife reported the money paid on the house as income.

(7) The only minor child of the marriage has now passed the age of 18 and the husband is no longer paying the \$38.00 per month in child support set forth in the agreement.

(8) At some point the husband lost his job or for other reasons became seriously in arrears on the house payments. In addition, he has not paid the insurance and taxes which the decree provides for.

(9) Husband filed a petition seeking modification of the previous decree in the Superior Court of Toombs County and characterized the house payment obligation in the former decree as constituting "alimony to the defendant". (Exhibit P-2).

CONCLUSIONS OF LAW

A discharge in bankruptcy does not relieve the Debtor from any debt:

"to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record or property settlement agreement, but not to the extent that--such debt includes a liability designated as alimony, maintenance, or support

unless such liability is actually in the nature of alimony, maintenance or support." 11 U.S.C. §523(a)(5).

State law determines the extent of a debtor's obligation under a divorce decree or separation agreement. In re Migliarese, 38 B.R. 978 (B.C.N.Y., 1984). Federal bankruptcy law determines whether the obligation created by state law is dischargeable in bankruptcy. Henry v. Henry, 5 B.R. 342 (B.C.Fla., 1980).

This Court's decision is controlled by the decision of the Eleventh Circuit Court of Appeals in Harrell v. Sharp, 754 F.2d 902 (11th Cir., 1985). The Circuit Court ruled that a debt arising out of a separation agreement is non-dischargeable if the parties created the debt to provide support for a dependant ex-spouse or child. The dischargeability of the debt must be determined from the circumstances and intent of the parties at the time of the divorce; the needs of the dependant ex-spouse, or the Debtor's ability to pay at the time of the bankruptcy do not affect the dischargeability of the obligation. Id.

The Plaintiff asks this Court to determine whether the Defendant may discharge his obligation to make payments of \$212.00 each month on a note secured by the Plaintiff's home. The uncontroverted testimony of the Plaintiff

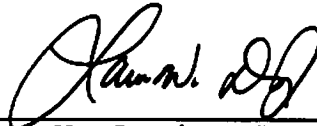
establishes that the parties intended the Defendant to make the Plaintiff's house payment as a form of child support. At the time of the divorce, the Plaintiff's take-home income was approximately one-half that of the Defendant. She could not have afforded to provide shelter for the parties' child unless the Defendant subsidized that shelter. From these circumstances, I conclude that the Defendant's obligation to pay \$212.00 per month on the Plaintiff's home mortgage is in the nature of support and non-dischargeable in bankruptcy.

Pursuant to the direction of the Eleventh Circuit in Harrell, supra., this Court will not attempt to determine the extent of the Defendant's arrearage to the Plaintiff or to determine how long his obligation to pay the home mortgage will continue.

"The precise terms under which the obligation may be enforced, however, can be established only through interpretation of the parties' separation agreements, a task that, should it become necessary, will presumably be performed by the appropriate state court. As we discussed in Part II.B of this opinion, establishing specific dollar amounts for domestic obligations is not an appropriate task for a federal court." Harrell, supra. at n.5.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that the Defendant's obligation to pay \$212.00 per month on the Plaintiff's home mortgage is non-dischargeable in bankruptcy.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 15th day of September, 1986.